



**STATE OF WASHINGTON  
DEPARTMENT OF LABOR AND INDUSTRIES  
EMPLOYMENT STANDARDS**

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**TITLE: OVERTIME**

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WAC 296-128**

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**Employees are generally entitled to overtime compensation for hours worked in excess of forty per week.** Unless an employee is exempt from the Minimum Wage Act or from overtime requirements (see page 6 of this policy), he or she must be compensated at an overtime rate of at least at one and one-half times his or her regular rate of pay for all hours in excess of forty in a seven-day workweek. See RCW 49.46.130(1). Overtime pay is required regardless of whether the employee is paid hourly or in some other manner, (commission, piecework, salary, non-discretionary bonus, etc., combinations thereof, or an alternative pay structure combined with an hourly rate) or whether payment is made on a daily, weekly bi-weekly, semi-monthly, monthly or other basis.

There is no limitation on the number of hours an employee may work in a workweek. An employer can require mandatory overtime but must compensate the employee accordingly. Overtime compensation is due when an employee works more than 40 hours in a workweek, regardless of whether the hours are worked on a Saturday, Sunday or holiday.

The overtime requirement may not be waived by agreement between an employee and employer. A declaration by an employer that no overtime work will be permitted, or that overtime work will not be paid unless authorized in advance, is not a defense to an employee's right to compensation for any overtime hours actually worked. The right to overtime compensation cannot be waived by individual employee agreement or by collective bargaining agreement.

## **If an employee must be paid overtime, how is the amount due calculated?**

If an employee is due overtime compensation for hours over 40 in a workweek, it must be paid at a rate “not less than one and one-half times the regular rate at which he [or she] is employed.” See RCW 49.46.130 (1).

- **Employees paid a single hourly rate.** Employees who are paid a single, hourly rate must be paid at least one and one-half their regular hourly rate of pay for each hour worked in excess of 40 in a seven-day workweek.
- **Employees paid other than at a single hourly rate.** For example, non-exempt salaried employees, piece rate, commission, non-discretionary bonus, and combinations of the above, including one or more of the above combined with an hourly rate, are also entitled to overtime pay at a rate of at least one and one-half the “regular rate” at which they are employed. See RCW 49.46.130(1) and WAC 296-128-550.

## **How is “regular rate” determined?**

Prior to computing overtime pay, it is necessary to determine the employee's regular rate. The regular rate may exceed the minimum wage pursuant to RCW 49.46.020, but may not be less. Regular rate of pay for other than strictly hourly pay plans or practices is determined by dividing the total weekly compensation received by the total number of hours the employee worked during the workweek, including the hours over forty. See WAC 296-128-550. **See ES.A.8.2, “How to Compute Overtime.”**

**Payments Included When Determining Regular Rate.** Certain payments other than hourly, commission, piece rate, or salary nonexempt payments must be included in the regular rate.

- **Bonuses:** Non-discretionary bonuses must be totaled in with other earnings to determine the regular rate on which overtime must be paid.
- **Non-Overtime Premium:** Lump sum payments that are paid without regard to the number of hours worked are not overtime premiums and must be included in the regular rate.
- **“On Call” Pay:** If employees who are on call and are not confined to their homes or to any particular place, but are required only to leave word where they may be reached or required to wear a beeper, the hours spent on-call are not considered “hours worked.” However, any payment for such on-call time, while not attributable to any particular hours of work, is paid for performing a duty connected with the job, and must be included in calculating the employee's regular rate.

**Certain payments may be excluded when determining regular rate.** The regular rate includes total compensation earned in the pay period, except certain payments. The following payments are not considered in determining regular rate provided all the conditions in each are met:

- **Overtime pay for hours in excess of a daily or weekly standard:** Extra compensation provided by a premium rate of at least *one and one-half* the usual hourly rate, which is paid for certain hours worked by the employee in any day or workweek because the hours are hours worked in excess of eight in a day or in excess of 40 in a workweek. Such extra compensation may be credited toward statutory overtime payments.
- **Premium pay for work on Saturdays, Sundays and other special days.** Extra compensation provided by a premium rate of at least *one and one-half* which is paid for work on Saturdays, Sundays, holidays or regular days of rest, or on the sixth or seventh day of the workweek as such, may be treated as overtime pay. However, if the premium rate is less than one and one-half, the extra compensation paid must be included in determining the regular rate of pay and cannot be credited toward statutory overtime requirements.
- **Discretionary bonuses.** A discretionary bonus or gift or payment in the nature of gifts given on special occasions need not be included in the regular rate if the employer retains discretion both that a bonus will be paid and that the amount will not be determined until the end, or near the end, of the bonus period, i.e., when an employer pays a bonus without prior contract, promise, or agreement and the decision as to the fact and amount of payment lay in the employer's sole discretion and the bonus is not geared to hours worked or production, the bonus would be properly excluded from the regular rate. If the employer announces a bonus in advance, discretion regarding the fact of payment has been abandoned and the bonus would not be excluded from the regular rate.
- **Gifts, Christmas and special occasion bonuses.** If a bonus paid at Christmas or on other special occasions is a gift, it may be excluded from the regular rate even though it is paid with regularity so that the employees are led to expect it. If the bonus is geared to hours worked or production, it is not considered as a gift and must be included in the regular rate.
- **Reimbursement for expenses.** When an employee incurs expenses on the employer's behalf, or where the employee is required to spend sums solely for the convenience of the employer, payments to cover such expenses are not included in the employee's regular rate of pay.
- **Payment for non-working hours.** Payments that are made for periods when the employee is not at work due to vacation, holiday, illness or similar situations,

may be excluded from the regular rate of pay. Such payments may not be credited toward statutory overtime requirements.

- **Show-up and call-back pay.** An employment agreement may provide for a stated number of hours pay if the employee is not provided with the expected amount of work. If the employee works only part of the hours but is paid for the entire number of hours in the agreement, the pay for the hours not worked is not regarded as compensation and may be excluded from the regular rate. Such pay cannot be credited toward overtime pay due.

Because the regular rate is determined by actual hours of work performed by an employee, employers are required to record all actual hours of work regardless of whether an employee is paid on hourly, salary, piece rate, commission or other basis. **See ES.D.1, Recordkeeping.**

### **Examples of Regular Rate In Various Situations:**

- **Hourly rate.** When an employee is paid solely on the basis of a single hourly rate, the hourly rate is the "regular rate." For overtime hours, the employee must be paid one and one-half times the hourly rate for each hour over 40 in the workweek.
- **Piece rate.** When an employee is paid on a piece rate basis, the regular rate of pay is computed by adding together the total earnings for the workweek from piece rate and all other earnings (such as bonuses), and any sums that may be paid for other hours worked. This sum is divided by the total number of hours worked in that week to yield the pieceworker's "regular rate" for that week. For the overtime work, the employee is owed, in addition to the total straight-time weekly earnings, one-half the regular rate for each hour over 40 in the workweek. The employee has already received straight-time compensation for all hours worked and only additional half-time pay is required.
- **Day rates/job rates.** An employee may be paid a flat sum for a day's work, or for doing a particular job, without regard to the number of hours worked in the day or at the job, and receive no other form of compensation. In such a case, the employee's "regular rate" is found by totaling all the sums received at such day rates or job rates in the work week and divided by the total hours actually worked. The employee must be paid an additional one-half pay at this rate for each hour over 40 in the workweek. The employee has already received straight-time compensation for all hours worked and only the additional half-time pay is required.
- **Payment of salary.** Salary payment arrangements must include a mutually understood agreement between employer and employee specifying the number of hours per week for which the salary is intended to cover. In the absence of a

clear understanding of the number of hours to be included in the weekly salary, the department will consider the salary agreement to be based on 40 hours.

- **Salary—weekly.** When an employee is employed solely on a weekly salary basis, the regular hourly rate of pay is computed by dividing the salary by the number of hours for which the salary is intended to compensate.
- **Salary—other than weekly.** When the salary covers a period longer than a workweek, such as a month, it must be reduced to its equivalent weekly wage by multiplying by 12 (months), and dividing by 52 (weeks). A semi-monthly salary is converted to its weekly equivalent by multiplying by 24 and dividing by 52. Overtime payment for salary paid other than weekly is determined the same as for weekly payment of salary.
- **Salary—workweek exceeding 40 hours:** A fixed salary for a regular workweek longer than 40 hours does not discharge the statutory obligation for nonexempt employees. For example, an employee may be hired to work a 44-hour workweek for a weekly salary of \$350. In this case, the regular rate is obtained by dividing the \$350 straight-time salary by 44 hours, which results in a regular rate of pay of \$7.95. The employee is due additional overtime computed by multiplying the four overtime hours by *one-half* the regular rate of pay at \$3.98 per hour, and the employee is due an additional \$15.92 above the \$350 salary for each week, for a total of \$365.92. If the employee worked more than 44 hours, the employee would be due additional pay for the hours worked over 44 computed by multiplying these additional overtime hours by *one and one-half* the regular rate of pay (\$7.95), or \$11.93 per hour for each hour worked in excess of 44 in any workweek.
- **Salary—fluctuating hours.** Salary for a fluctuating workweek occurs when an employee is employed on a fixed salary and it is clearly understood and agreed upon by both employer and employee that the hours will fluctuate from week to week and that the fixed salary constitutes straight-time pay for all hours of work, whether fewer or greater than forty hours per week. The regular rate is then obtained for each week by dividing the weekly salary by the number of hours worked each week. Since it was understood that all hours would constitute straight-time, all hours worked have already been paid at straight-time compensation; however, the employee is still entitled to receive an additional one-half hour's pay for each hour over 40 in the work week.
- **Employees working at two or more rates.** Where an employee in a single workweek works at two or more different types of work for which different straight-time rates have been established, the regular rate for that week is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. The employee is due the one-half rate for each overtime hour.

- **Commission payments (other than retail sales or service exception).** Commissions are payments for hours worked and must be included in the regular rate, regardless of whether the commission is the sole source of the employee's compensation or is paid in addition to a salary or hourly rate. It does not matter whether the commission earnings are computed daily, weekly or monthly.

When a commission is paid on a workweek basis, it is added to the employee's other earnings for that workweek and the total is divided by the number of hours worked in the workweek to obtain the employee's regular rate for the particular work week. The employee must then be paid extra compensation at the one-half rate for each overtime hour worked. See WAC 296-126-021. Note: **See ES.A.10.1, ES.A.10.2 and ES.A.10.3** for commissioned employees in retail sales or service establishments.

**Note:** In all of the above examples, if the regular rate should fall below the applicable minimum wage, the employee must be compensated for regular hours at the minimum wage and for overtime based on one and one-half the minimum wage rate.

#### **What is the definition of “workweek”?**

A workweek is a fixed and regularly recurring period of 168 hours during seven consecutive 24-hour periods. It may begin on any day of the week and any hour of the day. For purposes of overtime payment, each workweek stands alone; there can be no averaging of two or more workweeks. Once the beginning time of an employee's workweek is established it remains fixed, but may be changed if the change is intended to be permanent and is not designed to evade the overtime requirements. In the absence of a workweek established by the employer, the workweek automatically defaults to the calendar week, Sunday through Saturday.

#### **Who is exempt from overtime?**

**RCW 40.46.130 includes the following exemptions from overtime law.**

- (a) **Employees exempted from the Minimum Wage Act (MWA).** The entitlement to overtime comes from RCW 49.46.130, which is part of the MWA. Therefore, those who are exempted from the definition of employee under the Minimum Wage Act are *not* protected by the MWA, nor is it required they be paid overtime wages. **See ES.A.1**, Minimum Wage Act Applicability, for a detailed discussion of the exemptions contained in RCW 49.46.010(5). Also **see ES.A.9 (Pending)**, Exemptions from Minimum Wage and Overtime for Executive, Administrative, Professional, Computer Professional, and Outside Sales.

If a person who is exempted from the MWA is, nonetheless, paid overtime or is given compensatory time off by the employer on a voluntary basis, the payment of such additional compensation does not mean that the employee is thereafter entitled to overtime as a matter of law. See RCW 49.46.130 (2)(a).

**(b) Employees who request compensatory time off in lieu of overtime pay:**

**Note: Compensatory time off in lieu of overtime pay is not allowed for industries or enterprises that are subject to the federal Fair Labor Standards Act (FLSA). Employers must contact the U.S. Department of Labor to determine if their business is covered by FLSA.**

RCW 49.46.130(2)(b) and WAC 296-128-560 allow employees to request compensating time off in lieu of overtime pay. For compensatory time to substitute for a premium wage rate, however, certain criteria apply:

- The substitution of compensatory time off for premium pay must be at the employee's request and must be agreed to by the employee. Compensatory time is considered a benefit to the employee and the employer may not impose the requirement on any employee who has not made such a request.
- Compensatory time is valid only if accrued at the rate of one and a half hours off for each overtime hour worked.
- Upon termination of the employee/employer relationship, the balance of the accrued compensatory time must be paid in wages.

**(c) Persons employed as "Seamen."** "Seamen," regardless of whether they are employed on an American or other vessel. Seamen who work on American vessels are subject to the payment of minimum wage.

**(d) Seasonal employees of agricultural fairs.** Seasonal employees of agricultural fairs and seasonal employees who are employed at concessions and recreational establishments at agricultural fairs within the state of Washington as long as "the period of employment for any seasonal employee at any or all agricultural fairs does not exceed fourteen working days per year."

The department interprets "agricultural fairs" to mean any area, county, district and community fair and also including youth shows and fairs (generally having some public education component for the purpose of educating rural youth). Examples include the Puyallup Fair, King County Fair, Grant County Fair, etc. **The exception does not apply to amusement fairs such as a shopping mall carnival.**

The fourteen-day requirement is applied to individual employees. Thus, an employer could employ some workers for longer than fourteen days and would owe them overtime, or such workers could work at other fairs and would be entitled to overtime for that work, but an employer would not have to pay overtime to any individual employee who worked fourteen days or less in a year for a fair or fair concessionaire. If an employee does become entitled to overtime by working more than fourteen days in a year, the original employer is not retroactively liable for overtime. In other words, the first fourteen days of employment are not subject to the overtime requirement regardless of whether the employee works longer or at other fairs and is subject to overtime for the subsequent period.

- (e) **Unionized motion picture projectionists.** Motion picture projectionists covered by a contract or collective bargaining agreement that regulates hours of work and overtime pay.
- (f) **Truck or bus drivers subject to federal Motor Carrier Act.** Truck or bus drivers subject to the provisions of the federal Motor Carrier Act as long as the compensation system under which the truck or bus driver is paid includes overtime pay, reasonably equivalent to time and one half the driver's usual hourly rate. This provision does not apply to truck or bus drivers who are paid entirely by hourly wage rate or rates. See WAC 296-128-011 for special record keeping requirements applicable to employers of truck and bus drivers subject to the provisions of the Federal Motor Carriers Act, and see WAC 296-128-012 for application to the department for approval of an alternate pay system.
- (g) **Agricultural workers.** Overtime pay is not required in agricultural employment. Agricultural workers are defined as:
  - Workers who work on a farm for any person in connection with "cultivation of the soil" "raising or harvesting any agricultural or horticultural commodity (including raising, shearing, feeding, caring for, training and management of livestock, bees, poultry, furbearing animals and wildlife) or in the employ of the owner or tenant or other operator of a farm in connection with the operation, management, conservation, improvement or maintenance of such farm and its tools and equipment.
  - Workers employed in packing, packaging, grading, storing or delivering to storage or to market or to a carrier for transportation to market of any agricultural or horticultural commodity are not subject to overtime as long as the work is being done for an employer who actually produces the products.
  - Commercial canning, freezing, or other commercial processing activities related to agricultural or horticultural products as long as the work is performed for an employer who actually produces the products.



- Work performed in connection with the cultivation, raising, processing or harvesting of oysters as long as the work is performed for an employer who actually cultivates or produces the oysters.
- Work in connection with agricultural and horticultural commodities after delivery to a terminal market for distribution for consumption is not subject to overtime as long as the work is performed for an employer who is the producer of the product.

**Note: The department's policy is that the above agricultural exemptions to overtime apply *only* when the workers are employed by the entity that produced the agricultural or horticultural commodity. If the employer did not grow or produce the products, or if any amount of the products were obtained from another *source*, the employer loses the overtime exemption and the workers must be paid overtime. The exception to overtime does not apply to processing activities carried out by non-farming, non-livestock businesses that purchase fruit, vegetables or livestock from different sources and then engage in commercial processing. Purchasers of agricultural products are not exempt even though their workers may be engaged in grading, packing, sorting, processing, canning, etc., of the agricultural products.**

**(h) Industries that are subject to federal law requiring overtime based on a workweek other than 40 hours.** Examples in federal law include:

- Industries who lease federal land for recreational purposes, which requires payment of overtime after 56 hours per week.
- Hospitals and residential care establishments that pursuant to a prior agreement or understanding with their employees, utilize a fixed workweek period of 14 consecutive days in lieu of the workweek for the purpose of computing overtime, *if* they pay one and one-half times the regular rate for hours worked over eight in any work day, or 80 in the 14-day period, whichever is the greater number of hours.

**(i) Airline personnel who work more than 40 hours in a week if the hours are accrued as the result of a voluntary shift trade with another airline employee.** When an "employee of a carrier by air" who is subject to the provisions of subchapter II of the Railway Labor Act (45 USC Sec. 181) voluntarily works more than 40 hours in a week as a result of trading shifts with another employee or voluntarily accepting a reassignment and where the trade or reassignment gives the employee the opportunity to reduce hours in the

same or in other workweeks, it is not required that the employee be paid overtime wages for the hours over 40.

**Special exceptions exist for the following types of employees:**

**Commission employees of retail or service establishments.** Employees of “retail or service establishments” need not be paid one and one-half the regular rate for hours over 40 in a week *if* the employee’s regular rate of pay is greater than one and one-half times the current statutory minimum wage *and* more than half of the employee’s compensation for a representative period is due to commissions on goods or services. See RCW 49.46.130(3). For a detailed discussion of application of the retail or service establishment exception to overtime, refer to administrative policies ES.A.10.1, ES.A.10.2, and ES.A.10.3,

**Commissioned salespeople selling cars, trucks, RVs, campers, trailers, manufactured homes or farm implements to consumers.** Commissioned salespeople primarily engaged in the business of selling automobiles, trucks, recreational vessels, recreational vessel trailers, recreational vehicle trailers, recreational campers, manufactured housing or farm implements to ultimate purchasers need not be paid additional overtime for hours over forty in a week *as long as they are paid the greater of:*

- (a) At least the current minimum wage for each hour worked up to forty hours per week and at least one and one-half times the current minimum hourly rate for all hours worked over forty in one week; or
- (b) A straight commission, a salary plus commission, or a salary plus bonus applied to gross salary.

Note: This exception, RCW 49.46.130(4), applies only to those workers who sell the types of vehicles listed in the statute. *It is different from the retail sales exception to overtime.* Employees other than salespersons may be subject to the retail sales exception in RCW 49.46.130(3). **See ES.A.10.1, ES.A.10.2 and ES.A.10.3** for interpretation of the retail and service establishment exception.

**Public sector fire protection and law enforcement employees of agencies of agencies with fewer than five employees.** Under RCW 49.46.130(5), employees of a public agency who are engaged in “fire protection” and “law enforcement” activities (which includes security personnel in correctional institutions) are not required to be paid additional overtime compensation for hours over 40 in a week *if* (a) in a 28-consecutive day work period the employee earns at least one and one-half his or her regular rate of pay for hours worked in excess of 240 total in that 28-consecutive day work period; or (b) In a work period of not less than seven days but not more than 28 days, the employee earns at least one and one-half his or her regular rate of pay for total hours worked in excess of the number equal to the ratio of 240 hours to 28 days. Note: Agencies with five or more employees in fire protection and law enforcement activities are covered by the federal Fair Labor Standards Act.